LUM, DANZIS, DRASCO & POSITAN, LLC
103 Eisenhower Parkway
Roseland, New Jersey 07068
(973) 403-9000
(DD2022)(KO9378)
Attorneys for Defendant
Sidley Austin Brown & Wood LLP

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH STECHLER; GAIL STECHLER; and STECHLER & CO., INC. f/k/a JOSEPH STECHLER & CO., INC, Plaintiffs, - against - SIDLEY AUSTIN BROWN & WOOD LLP; R.J. RUBLE; ALPHA CONSULTANTS, INC.; ALPHA CONSULTANTS, L.L.C.; IVAN ROSS; IRWIN ROSEN; GRANT THORNTON, L.L.P.; GRANT THORNTON INTERNATIONAL; ISRAEL PRESS; REFCO CAPITAL MARKETS, LTD.; and REFCO CAPITAL LLC, Defendants.	**Civ. Action No.** **NOTICE OF REMOVAL**

TO: THE HONORABLE JUDGES
of the United States District Court
for the District of New Jersey:

PLEASE TAKE NOTICE that Defendant, Sidley Austin Brown & Wood LLP ("Brown & Wood"), with a place of business at Bank One Plaza, 10 South Dearborn Street, Chicago, Illinois, 60603 hereby removes to this Court civil action number BER-L-4172-05 currently pending before the Superior Court of the State of New Jersey, Law Division Bergen

Dockets.Justia.com

County (the "State Court Action") pursuant to 28 U.S.C. §§ 1331 and 1441 *et seq.* This Court has original jurisdiction over this action because Plaintiffs' claims depend on the construction of federal law.

In further support of this Notice of Removal, Brown & Wood states as follows:

THE COMPLAINT

1. On or about June 14, 2005, Plaintiffs Joseph Stechler, Gail Stechler and Stechler & Co., Inc. filed their Complaint in the State Court Action against Defendants Brown & Wood, R.J. Ruble, Alpha Consultants, Inc., Alpha Consultants, L.L.C. and Ivan Ross, Irwin Rosen, Grant Thornton, L.L.P., Grant Thornton International, Israel Press, Refco Capital Markets, Ltd., and Refco Capital LLC. A copy of the Summons dated June 27, 2005 and a copy of the Complaint are attached hereto as Exhibit A. Plaintiffs previously filed suit against all of the Defendants named in the State Court Action (as well as other defendants) in the United States District Court for the Southern District of New York (the "SDNY Action"). In an Opinion and Order filed on April 5, 2005 (the "SDNY Opinion") the Court dismissed Plaintiffs' complaint without prejudice, with leave to replead Plaintiffs' dismissed RICO claim as a claim under the federal securities laws. A copy of the SDNY Opinion is attached hereto as Exhibit B. Plaintiffs apparently elected to file the State Court Action instead of filing an amended complaint in the SDNY Action.

2. Plaintiff's suit is premised on their participation in a transaction known as a "Digital Options Strategy." Plaintiffs allege that they participated in this strategy to "legitimately save the Stechlers' taxes" that they otherwise would have paid to the United States government. *Id.* ¶ 49. The Complaint alleges that the Defendants and others fraudulently "assured Mr. Stechler that the Strategy was completely legal and valid and took

advantage of a legal loophole in the [federal] tax code", *id.*, that Plaintiffs were promised that they would receive a written opinion from Brown & Wood that "would not only support the validity of the tax strategy but would also insure that the IRS would not assert penalties," *id.*, that Plaintiffs were assured that "the Strategy was legal and valid [and] that if they were ever audited, the Strategy would withstand IRS scrutiny and that the IRS would not and could not assess penalties against them," *id.* ¶ 67, and that they were told that "the Digital Options Strategy was not required to be disclosed on the Plaintiffs' individual federal tax return pursuant to [U.S.] Treas. Reg. § 1.6011-4(a)." *Id.* ¶ 113. The Complaint further alleges that Defendants "marketed, sold and implemented a tax strategy that they knew or certainly should have known had no chance of being held valid by the IRS," *id.* ¶ 56, and that "Defendants knew or should have known as a result of IRS Notices 1999-59 and 2000-44 issued on August 11, 2000, if not earlier, that the purported losses arising from the Plaintiff's participation in the Digital Options Strategy were not properly allowed for Federal or State income tax purposes." *Id.* ¶ 111. Plaintiffs further allege that they relied on these alleged misrepresentations and were damaged by their reliance. *See, e.g.*, *id.* ¶¶ 166-71. Based on these core allegations, Plaintiffs seek relief for unjust enrichment, breach of contract/breach of the duty of good faith and fair dealing, breach of fiduciary duty, fraud, negligent misrepresentation, professional malpractice/negligence, breach of contract and civil conspiracy. Plaintiffs also seek a declaration that Defendants are liable to Plaintiffs for interest and federal tax penalties owed by Plaintiffs to the IRS.

FEDERAL QUESTION JURISDICTION

3. This Court has jurisdiction over this action under 28 U.S.C. §§ 1441 and 1331 because it is a civil action arising under the Constitution, laws or treaties of the United States.

A suit alleging state law claims "arises" out of federal law so to create original federal question jurisdiction where the plaintiff's right to relief on the state law claims turns on, or depends on, the construction of federal law. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983) (finding federal question jurisdiction "where the vindication of a right under state law necessarily turned on some construction of federal law"); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (federal jurisdiction proper where state law claim "depends upon the construction or application" of federal law). On June 13, 2005, the United States Supreme Court reaffirmed the longstanding precedent that federal question jurisdiction exists where a state law claim turns on the construction of federal law. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005). The Supreme Court specifically found federal question jurisdiction over state law claims turning on disputed issues of federal tax law. In affirming federal jurisdiction, the Supreme Court emphasized that "the national interest in providing a federal forum for federal tax litigation is sufficiently substantial to support the exercise of federal question jurisdiction." *Id.* at 2365.

4. Here, Plaintiffs allege that Defendants intentionally or negligently misrepresented to them that tax deductions taken as a result of losses incurred by participation in the Digital Options Strategy were valid under the federal tax code, that they were more likely than not to be upheld by the federal courts if challenged by the IRS, and that the transactions did not need to be registered as tax shelters with the IRS under federal tax law and regulations. *See* Compl. ¶¶ 49, 51, 56, 67, 71, 73, 108, 111-13, 115, 117-18, 121, 125-27, 131. Plaintiffs further allege that Defendants committed negligent misrepresentation and fraud and breached their alleged fiduciary duties and professional obligations by making these

purported misrepresentations. *See id.* ¶¶ 160-62, 166-67, 173-77, 184-87. Plaintiffs' claims therefore depend on proving that Defendants' alleged statements were false, requiring construction of complicated federal tax laws and regulations.

5. Based on the foregoing, this Court has federal question jurisdiction over the entirety of this action pursuant to 28 U.S.C. § 1331 and/or supplemental jurisdiction pursuant to 28 U.S.C. § 1367.[1] Accordingly, removal of this action to this Court is proper pursuant to 28 U.S.C. § 1441.

SATISFACTION OF PROCEDURAL REQUIREMENTS

6. To date, the Summons and Complaint have not been served on any of the Defendants. This Notice of Removal therefore is timely pursuant to 28 U.S.C. §§ 1446(b).

7. Removal to the United States District Court for the District of New Jersey is proper under 28 U.S.C. § 1441 because this Court embraces the Superior Court of the State of New Jersey, Bergen County, "the place where such action is pending." 28 U.S.C. § 1441(a).

8. Counsel for Brown & Wood has consulted with counsel to all of the other Defendants apart from Mr. Rosen, and they all consent in this Removal. In the course of the SDNY Action, counsel to Alpha Consultants, Inc., Alpha Consultants, L.L.C. and Ivan Ross (the "Alpha Defendants") informed Plaintiffs' counsel that they do not represent Mr. Rosen. They further represented to Plaintiffs' counsel that Mr. Rosen never was employed by the Alpha Defendants. Plaintiffs refused to dismiss Mr. Rosen from the SDNY Action, notwithstanding this representation. Mr. Rosen did not appear in the SDNY Action.

---

[1] To the extent (if any) that this Court determines it lacks federal question jurisdiction over any particular claim, it still has supplemental jurisdiction over that claim pursuant to 28 U.S.C. § 1367.

9. A Stipulation of Consent to this Removal signed by counsel to all of the Defendants (other than Mr. Rosen) is attached hereto as Exhibit C.

10. A true copy of this Notice of Removal will be served on counsel for Plaintiffs and will be filed with the Clerk of Superior Court of the State of New Jersey, Bergen County, promptly after filing this Notice, in accordance with 28 U.S.C. § 1446(d).

WHEREFORE, for the foregoing reasons, Brown & Wood respectfully requests that this case be removed from the Superior Court of the State of New Jersey, Bergen County, to this Court.

Dated: July 11, 2005

Respectfully submitted,
LUM, DANZIS, DRASCO & POSITAN, LLC

[signature]
KEVIN J. O'CONNOR (KO9378)

Aaron R. Marcu
Andrew A. Ruffino
Jason P. Criss
COVINGTON & BURLING
1330 Avenue of the Americas
New York, New York 10019
(212) 841-1000
(pro hac vice applications to be submitted)

Attorneys for Defendant
Sidley Austin Brown & Wood LLP